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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

NTDEC, NINTENDO ELECTRONIC CO., LTD., JIMMY YAO, WANG WEN-FU, WANG SU-TANG, CHEN MEI-LIN and MEGA SOFT, INC.,

Petitioners,

v.

NINTENDO OF AMERICA, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a $24+ million default judgment against seven Taiwanese defendants meet the requirement of due process when the defendants received no actual notice of the impending judgment or its probable magnitude?

2. Does that same default judgment comply with the statutory language and equitable principles embodied in the Lanham Act, 15 U.S.C. §1117, when the judgment is based on the defendants' purported gross sales rather than their "profits," and those sales are then trebled?

PARTIES TO THE PROCEEDING

All of the parties are named in the caption. To the knowledge of Petitioners' counsel, the three corporate Petitioners have no corporate parents on subsidiaries, although Petitioner Mega Soft, Inc. was at one time intended to be Petitioner NTDEC's affiliate in Los Angeles.

As recited in the Memorandum Decision of the Ninth Circuit Court of Appeals, Respondent Nintendo of America, Inc. is a wholly owned subsidiary of Nintendo Company, Ltd. of Kyoto, Japan.

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OPINIONS IN THIS CASE

On May 19, 1993 the United States District Court for the District of Arizona (Visiting Senior District Judge James F. Battin) issued Findings of Fact and Conclusions of Law. They have been reported in Nintendo of America, Inc. v. NTDEC, 822 F. Supp. 1462 (D. Ariz. 1993). On June 9, 1993 the District Court entered an Amended Judgment in a Civil Case, in accordance with those Findings and Conclusions. On August 25, 1993 the District Court filed a Memorandum and Order, denying Petitioners' motion to set aside the Amended Judgment.

On March 28, 1995 the Judgment of the District Court was affirmed in a Memorandum Decision of the Ninth Circuit (Judges William A. Norris, Charles E. Wiggins and Ferdinand F. Fernandez), issued "not for publication."

JURISDICTION OF THIS COURT

The Memorandum Decision of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court of Arizona, was filed on March 28, 1995. There was no request for a rehearing. Hence, this Petition for Writ of Certiorari is timely if filed or postmarked by June 26, 1995.

Petitioners believe that this Court has jurisdiction to review the decision of the Ninth Circuit under 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THIS CASE

Federal Rule of Civil Procedure 60(b)(6):

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:...(6) any other reason justifying relief from the operation of the judgment.

Lanham Act, 15 U.S.C. §1117(a) and (b):

(a) Profits; damages and costs; attorney fees

When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, or a violation under section 1125(a) of this title, shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable

attorney fees to the prevailing party.

(b) Treble damages for use of counterfeit mark

In assessing damages under subsection (a) of this section, the court shall, unless the court finds extenuating circumstances, enter judgment for three times such profits or damages, whichever is greater, together with a reasonable attorney's fee, in the case of any violation of section 1114(1)(a) of this title or section 380 of Title 36 that consists of intentionally using a mark or designation, knowing such mark or designation is a counterfeit mark (as defined in section 1116(d) of this title), in connection with the sale, offering for sale, or distribution of goods or services. In such cases, the court may in its discretion award prejudgment interest on such amount at an annual interest rate established under section 6621 of Title 26, commencing on the date of the service of the claimant's pleadings setting forth the claim for such entry and ending on the date such entry is made, or for such shorter time as the court deems appropriate.

STATEMENT OF THE CASE

On May 31, 1991 Nintendo of America, Inc. ("Respondent") filed a complaint against NTDEC, Nintendo Electronic Co., Ltd., Jimmy Yao, Wang Wen-Fu, Wang Su-Tang, Chen Mei-Lin and Mega Soft, Inc. (jointly "Petitioners") in the United States District Court for the District of Arizona. The complaint sought damages and injunctive relief for copyright infringement, trademark infringement, unfair competition and false designation of origin. Jurisdiction was alleged under 17 U.S.C. §501, 15 U.S.C. §1121, and 28 U.S.C. §§1331 and 1338; and was found to exist by the District Court.

Petitioners are two Taiwanese corporations (NTDEC and Nintendo Electronic Co., Ltd.), their one time intended affiliate in Los Angeles, California which never became operational (Mega Soft, Inc.) and four Taiwanese individuals (Jimmy Yao, Wang Wen-Fu, Wang Su-Tang and Chen Mei-Lin) who worked for or were otherwise connected with one or the other of the Taiwanese corporations.

On July 7, 1991 Edmund Y. Nomura, an attorney in Phoenix, Arizona, served an answer to the complaint on behalf of all seven Petitioners. Two of the individual Petitioners (Wang Su-Tang and Chen Mei-Lin) had not been served with process and had not been in the United States. Nonetheless, on June 18, 1991 Nomura had acknowledged to Respondent and the District Court that he was authorized to accept service for all Petitioners, both those served and those not served. On August 14, 1991 the District Court approved the substitution of counsel whereby Burton M. Bentley, another Phoenix attorney, assumed the representation of four of the Petitioners: Nintendo Electronic Co., Ltd., Jimmy Yao, Wang Wen-Fu and Mega Soft, Inc.

In March 1992 Nintendo Electronic Co., Ltd. and Mega Soft, Inc. answered document requests which had been propounded by Respondent. On April 21, 1992 Wang Wen-Fu was deposed by Respondent in Tucson, Arizona, with the assistance of two Chinese language interpreters.

Some time after the deposition, Wang Wen-Fu left the United States and returned to Taiwan. From that point on, Petitioners' attorneys appear to have lost contact with their clients. On August 24, 1992 Mr. Bentley

filed a motion to withdraw from representing his four clients. All four approved the withdrawal in a document which provided that they should be served henceforth "c/o Henry Wong, 6636 E. 26th Street, Los Angeles, California 90040". The District Court granted the motion on September 11, 1992.

On September 3, 1992 Mr. Nomura served a motion to withdraw from representing Petitioners NTDEC, Wang Su-Tang and Chen Mei-Lin. He cited geographic and language barriers as the reasons for the cessation of his communications with his clients. On October 2, 1992 the District Court granted Mr. Nomura's motion, with the provision that all future court documents would be served on his former clients at: NTDEC Electronics Co., Ltd., 6 F No. 22, Sec. 2, Keelung Road, Taipei, Taiwan, R.O.C. The order also directed these three Petitioners to furnish the court with a current address and telephone number, and with any changes of address or telephone number in the future.

During the period that Petitioners' attorneys were withdrawing and afterward, Respondent filed motions for default judgment based on Petitioners' various failures to provide discovery and comply with court orders directing them to do so. On August 21, 1992 Respondent served a motion for entry of default judgment against NTDEC, Wang Su-Tang and Chen Mei-Lin. On November 5, 1992 Respondent served a similar motion against Nintendo Electronic Co., Ltd. and Jimmy Yao. On January 20, 1993 Respondent served a similar motion against Wang Wen-Fu. On February 17, 1993 Respondent served the last such motion, for default judgment against Mega Soft, Inc.

The first of these four motions was served on Petitioners' Arizona counsel, with whom Petitioners were no longer in contact. The second motion was served on "Mr. Henry Wong, 6636 East 26th Street, Los Angeles, CA 90040". The third and fourth motions were served on Mr. Henry "Wang" at the Los Angeles address, and NTDEC in Taiwan. All of the motions were unopposed and eventually granted.

On March 30, 1993 the District Court held a hearing on damages. Only Respondent and its witnesses attended. The court heard testimony on the problems and estimated losses worldwide that Respondent and its corporate parent had suffered due to counterfeiting activity from numerous

sources, including many persons unrelated to Petitioners. The court was told of certain isolated sales purportedly made by Petitioners to entities in the United States, Mexico and South America in 1990 and the first half of 1991.

Respondent's witnesses testified concerning Petitioners' purported production capacity in Taiwan, Malaysia and the Philippines. From this information, and without any supporting evidence, the court concluded that Petitioners were operating at maximum capacity throughout the entire damage period, fully engaged in making products which infringed those of Respondent. Although Respondent's expert acknowledged that it was "very costly" and a "sophisticated process" for Petitioners to replicate Respondent's video game products, the court made no allowance for any costs incurred by Petitioners in so doing. The court treated Petitioners' entire hypothetical gross receipts as pure profit, since the absent Petitioners did not provide any evidence to the contrary. The District Court then trebled these gross receipts and awarded Respondent judgment for $24,059,062, plus attorneys' fees of $108,829 and costs.

The staggeringly large judgment attracted the attention of the foreign business press, and Wang Wen-Fu first learned of it from an article in a Taiwanese newspaper. He promptly retained his present attorney, who is Chinese-American, and sought to set aside the amended default judgment.

On June 17, 1993 Wang Wen-Fu singed a declaration in which he denied each of the statements made in the District Court's findings Nos. 25(a) through (h), concerning sales of infringing products, and denied that Mr. Nomura had been authorized to accept service of process for any of the Petitioners. Wang Wen-Fu was under the misimpression that Petitioners had never answered the complaint, and that they had not done so based on their misapprehension that any judgment would be unenforceable in Taiwan.

Wang Wen-Fu declared that Petitioners had never received actual notice of Respondent's applications for default judgment, and explained that the East 26th Street address in Los Angeles, California had become obsolete before Respondent began sending papers to it. That location was to have been the place of business of Mega Soft, Inc., and none of the

other Petitioners, who are all permanent residents of Taiwan, had ever used that address.

On July 15, 1993 Henry Wong submitted a supporting declaration. He recalled that in 1992 he had received a number of documents from a law firm, simply addressed to him. Since Wong had not been instructed to forward the documents to anyone else, and did not know that he was supposed to do so, he just marked "return to sender" on the outside of the envelopes, and redeposited them in the mailbox.

In a Memorandum and Order filed on August 25, 1993, the District Court denied Petitioners' motion to set aside the default judgment. Petitioners' Notice of Appeal to the Ninth Circuit was filed on September 23, 1993.

ARGUMENT

I PETITIONERS' LACK OF ACTUAL NOTICE COUPLED WIT H THE MONUMENTAL AMOUNT OF THIS DEFAULT JUDGMENT PROVIDE EQUITABLE REASONS FOR VACATING IT.

Federal Rule of Civil Procedure 6 (b) (6) provides that, on such terms as are just, the court may relieve a party from a final judgment for any reason justifying relief. This rule calls upon the court to dispense due process, tempered with considerations of equity. Petitioners submit that the harsh treatment accorded them was not merited, and that the courts below should have given due weight to their geographic distance from the forum, their lack of familiarity with the language and judicial system prevailing in this country, and the magnitude of Petitioners' ultimate liability.

In Erick Rios Bridoux v. Eastern Air Line, 214 F.2d 207 (D.C. Cir.), cert. denied 348 U.S. 821 (1954), such equitable considerations were accorded weight on appeal, resulting in a reversal of the financial calamity that had befallen another alien in our court system. Bridoux was a citizen of Bolivia. An airplane he was piloting collided in the air with one operated by Eastern Air Line, causing many fatalities. When Eastern sued, attorneys retained to defend Bridoux filed an answer and counterclaim for him. Bridoux then returned to his native country, after which his attorneys were granted leave to withdraw. When Bridoux, who was then in pro per, failed to attend a pretrial conference, the court entered a default judgment against him for $160,000.

The appellate court noted that Bridoux had left the United States because he had no money to remain. He had not received notice of his attorney's withdrawal or the pretrial hearing, although Eastern had attempted to serve him. Only after the default judgment had been entered did Bridoux receive actual notice of the proceeding. The reviewing court commented on the "very large money judgment entered by default" and concluded that Bridoux "should have exercised greater care to keep parties and counsel advised of his address." (214 F.2d at 210) The court fashioned an equitable remedy to accommodate the interests of both sides: the court set aside the default judgment while allowing the dismissal of

Bridoux's counterclaim to stand.

Clearly, the size of the default judgment against Bridoux pales in comparison to the $24,000,000+ default judgment against the present Petitioners. The latter, too, could have maintained better communications. But their omissions do not merit a $24,000,000+ penalty. A fair result in these circumstances would be to set aside the enormous default judgment while allowing the determination of liability to stand.

The courts below were understandably affronted at what they perceived to be a deliberate disregarding of our legal process. But these reactions should not have been allowed to interfere with the dispensing of justice. In Carl Marks & Co. v USSR, 665 F. Supp. 323 (S.D.N.Y. 1987), aff'd 841 F.2d 26 (2d Cir.), cert. denied 487 U.S. 1219 (1988), suit was brought against the Soviet Union to collect on Imperial Russian bonds, and a default judgment was entered. Afterward, the defendant moved under F.R.C.P. 60(b) to vacate that judgment.

The Second Circuit was "convinced that the USSR at all times knew that it was necessary to answer and appear in order to assert the waivable affirmative defense of sovereign immunity" (665 F. Supp. at 332). However, the court also recognized that "the Soviet Union's willful default is tempered by its genuine but unfounded belief that it enjoys such sovereign immunity that it can merely crumple and discard our legal process, and that this inherent quality of sovereignty cannot be impaired unilaterally by the United States' adoption of the [Foreign Sovereign Immunities Act] (Id.). The court's reasoning then led it to set the default aside under F.R.C.P. 60(b)(4).

In the present case the Petitioners, lacking the resources of the former Soviet Union's arsenal of legal advisers, were also under a genuine but unfounded belief that the judgment of an American court could not be enforced against them in their native country. Now of a different view, Petitioners respectfully seek the opportunity to prove what their liability should realistically be.

Petitioners' earnest plea should be considered in light of the fact that they received no actual notice of the colossal liability sought to be imposed on them. Instead of serving notice on Petitioners "in care of"

Henry Wong, as the District Court had directed, Respondent simply mailed papers to Henry Wong, with no reference to Petitioners on any of the envelopes. Mr. Wong was neither an attorney nor a party to the litigation, and he simply returned the unfamiliar papers to the sender.

This is not the same situation as occurred in National Development Co. v. Triad Holding Corp., 131 F.R.D. 408, 413 (S.D.N.Y 1990), cert. denied 112 S. Ct. 440, where legal papers were given to a person who normally forwarded them to the defendant (Adnan Khashoggi) overseas, and where the defendant was a sophisticated businessman thoroughly fluent in English.

Finally, when Respondent's various papers leading to the default judgment were filed with the court, they were uniformly deficient in meeting the requirement of F.R.C.P. 5(d) that they include a signed certificate of service. Respondent ameliorated these deficiencies to the satisfaction of the District Court by submitting the declaration of a legal secretary on July 6, 1993, one month after the Amended Judgment had been issued, when Petitioners were seeking to set it aside.

In their strong desire not to reopen the proceedings which had been concluded, the courts below glossed over the procedural requirements for filing documents contained in the federal rules, to Petitioners' substantial detriment. A different approach was taken in Schwartz v. Marketing Pub. Co., 153 F.R.D. 16, 20 (D. Conn. 1994), where the court demonstrated much more deference for due process. In that case the court explained:

> The notation "cc:", which commonly appears at the end of a letter, obviously does not comply with either the letter or the spirit of Rule 5. The notation is probably understood to mean that a copy has been transmitted to the person identified. Standing alone, however, the notation certifies absolutely nothing. Nor does the ambiguous "cc:" reveal either the date or the manner of transmission to the recipient. This plainly is not what Rule 5 requires. Rather, the rule contemplates a clear and unambiguous certification that a document was served in a particular way on a certain date. Anything short of this invites mischief.

II IN AWARDING DAMAGES BASED ON A TREBLING OF PETITIONERS' GUESTIMATED GROSS SALES, THE COURTS BELOW GAVE RESPONDENT AN INEQUITABLE WINDFALL.

Practically all of the damages comprising the $24,059,062+ judgment were awarded under the Lanham Act, 15 U.S.C. §1117(a) and (b). Subsection (a) entitles Respondent to Petitioners' "profits" and places the burden on Petitioners of proving their costs of production and sale. That subsection also requires the court to employ "principles of equity" and mandates that the amount of any award "constitute compensation and not a penalty."

Admittedly, Petitioners were not present to refute the gross sales misattributed to them, or to prove their substantial costs of production and sale. Nevertheless, the District Court was bound to follow the law: "section 1117(a) (unlike section 1117(b)) does not allow a 'penalty' against the defendant. . . . the benchmark for making this determination is the likely benefit accruing to the defendant on account of its infringement." Badger Meter, Inc. v. Grinnell Corp., 13 F.3d 1145, 1157 (7th Cir. 1994).

In Lindy Pen Co. v. Bic Pen Corp., 982 F.2d 1400, 1405-1408 (9th Cir. 1993), where the defendant was not in default and presented a more sympathetic posture, the court was more mindful of the statutory guidelines for awarding damages. The court reiterated that the plaintiff is not entitled to "a windfall", citing Bandag, Inc. v. Al Bolser's Tire Stores, 750 F.2d 903, 918 (Fed. Cir. 1984). The court noted that the Lanham Act "clearly stipulates that a remedy 'shall constitute compensation [and] not a penalty.' 15 U.S.C. §1117(a)." The court deferred to the teaching of this Court in Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 379 (1927), that while absolute exactness is not required, "a reasonable basis for computation must exist." (982 F.2d at 1407) The court concluded that the plaintiff's burden was to establish the defendant's "gross profits from the infringing activity with reasonable certainty." (Id. at 1408)

Accord, Burger King Corp. v. Mason, 710 F.2d 1480, 1495, reh. denied 718 F.2d 1115 (11th Cir. 1983), cert. denied 465 U.S. 1102: "Guided by the principles of equity, the court may award the defendants profits. . . . . The statute also provides for the adjustment of any profits award if it is inadequate or excessive."

In the present case, the quest for reasonableness and equity was abandoned. Petitioners' purported gross sales, which Respondent had every incentive and opportunity to inflate, and which Petitioners refuted in their motion to set aside the default judgment, were accepted as synonymous with profits. The distortion was then multiplied threefold by the statutory trebling. The result was what the court in United States v. Miller, 9 F.R.D. 506, 509 (M.D.Pa. 1949), described as "unconscionable". In Miller a default judgment for treble damages under the Emergency Price Control Act, based on a guess as to the amount of overcharges, was held to be excessive to the point of being unconscionable, justifying relief from default under F.R.C.P. 60(b). The court ruled that the judgment had to be based on something more substantial than guesswork or estimates.

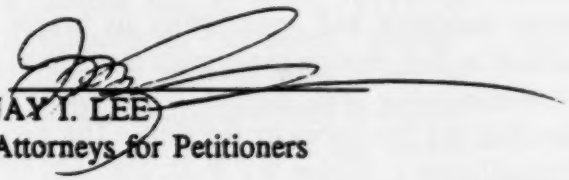
CONCLUSION

Petitioners may not be the most sympathetic parties to come before this Court, but they are smalltime businessmen who have been pursued relentlessly by a large multinational corporation, which is much better equipped financially, culturally and linguistically to wend its way through the American judicial system. The result is a $24,000,000+ default judgment, based on a complaint which contained no dollar amounts, and an evidentiary hearing of which Petitioners received no actual notice. The colossal award was arrived at without resort to any principles of equity; when trebled, it produced a windfall for Respondent which far exceeds statutory bounds.

Petitioners request that certiori be granted so that this injustice can be reexamined, for the benefit of all persons who may henceforth seek the extraterritorial enforcement of American judgments.

Dated: June 23, 1995

CHANG & LEE

By 
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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAR 28 1995

Cathy A. Catterson, Clerk
U.S. Court of Appeals

NINTENDO OF AMERICA INC.,	)
	)No. 93-16858
Plaintiff-Appellee,	)D.C No. CV-91-00300-WDB
	)
vs.	)
	)
NTDEC, NINTENDO ELECTRONIC CO., JIMMY YAO, WANG WEN-FU; WANG SU-TANG, CHEN MEI-LIN and MEGA SOFT INC.	)MEMORANDUM*
	)
	)
Defendants-Appellants.	)
	)

Appeal from the United States District Court
for the District of Arizona
William D. Browning, District Judge, Presiding

Submitted March 15, 1995**
San Francisco, California

Before: NORRIS, WIGGINS, and FERNANDEZ, Circuit Judges

OVERVIEW

Defendants appeal from the entry and amount of a default judgment in favor of plaintiff in this action for copyright and trademark infringement in violation of 17 U.S.C. §501 and 15 U.S.C. §1121 and for unfair competition. Plaintiff, a video game

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel finds this case appropriate for submission without argument pursuant to Fed. R. App. P. 34(a) and 9th Cir. R. 34-4.

manufacturer, alleged that defendants were engaged in a largescale operation counterfeiting plaintiff's video games. The district court awarded plaintiff $24,059,062 plus attorneys fees of $108,829.00 and costs of $709.80. The court also granted a worldwide permanent injunction to prevent continued violation of plaintiff's intellectual property rights.

Defendants challenge, first, the entry of default judgment, alleging defects in plaintiff's service of documents subsequent to the complaint. Next, they challenge the amount of the judgment, claiming that although the district court's calculations purported to base the award on defendants' profits from their illegal activity, in fact the court unrealistically assumed defendants had zero costs of production and distribution. Finally, defendants appeal the district court's denial of their motion to set aside the default judgment. This court has jurisdiction over the timely appeal under 28 U.S.C. §1291, and we affirm.

BACKGROUND

Plaintiff-appellee, Nintendo of America, Inc. ("Nintendo"), is a wholly owned subsidiary of Nintendo Company, Ltd. of Kyoto, Japan. Nintendo is the owner of Nintendo Company, Ltd.'s copyrights and trademarks in its products in the United States. Defendants-appellants NTDEC and Nintendo Electronic Co. are Taiwanese corporations. Defendant Mega Soft, Inc. is NTDEC's Los Angeles affiliate. Both NTDEC and Mesa Soft are owned and/or

operated by defendants Jimmy Yao, Wang Wen-Fu, Wang Su-Tang, and Chen Mei-Lin, who are citizens of Taiwan.

Defendants made a business of reproducing plaintiff's computer games, repackaging them, and exporting them for sale into the United States and other countries. Investigators for plaintiff, posing as potential wholesale buyers, visited defendants' plant in Taiwan, purchased samples of infringing products, and were given sales brochures with price lists for infringing products.

On June 4, 1991, defendants Jimmy Yao and Wang Wen-Fu were arrested in Chicago for violating 18 U.S.C. §2320 (trafficking in counterfeit goods) on the basis of their importation and sale of counterfeit Nintendo video game cartridges in the United States. The U.S. Attorney dropped the criminal charges in exchange for a guilty plea by Nintendo Electronics Company, Ltd. on the same felony charge.

Nintendo brought the current civil action shortly after the arrest in Chicago. Nintendo served Jimmy Yao and Wang Wen-Fu personally with the complaint. Their attorney, Edmund Nomura, acknowledged service on behalf of all the defendants and filed an answer on July 2, 1991. On August 14, 1991, Burton Bentley was substituted as attorney of record for defendants Nintendo Electronics Co., Jimmy Yao, Wang Wen-Fu, and Mega Soft. Nomura continued to represent defendants NTDEC, Chen Mei-Lin, and Wang Su-Tang.

Plaintiff Nintendo's attempts to conduct discovery were repeatedly frustrated. Plaintiff succeeded in deposing Wang Wen-Fu, but defendants subsequently ceased to participate in further discovery. Nintendo resorted to motions to compel discovery, which the district court granted. Its orders explicitly threatened the entry of a default judgment for failure to comply.

On August 24, 1992, Bentley moved to withdraw as counsel. Included in the motion was a consent, signed by all his clients except Jimmy Yao, to serve them "addressed to Defendants, and each of them c/o Henry Wong." His motion to withdraw was mailed to the defendants in care of Wong. On September 9, Nomura also filed a motion to withdraw as counsel. His declaration shows that he had been unable to communicate with any of the defendants: his clients failed to respond to his repeated letters or provide any instructions. On September 11, the court granted Bentley's motion to withdraw. The order directed that all pleadings be "served on said Defendants, in care of Henry Wong" and listed Wong's address. On October 2, the court granted Nomura's motion to withdraw and ordered that service on Nomura's former clients be made at the following address: NTDEC Electronics Co., Ltd., 6F No. 22, Sec.2 Keelung Rd., Taipei, Taiwan, R.O.C.[1]/ The order also instructed each of Nomura's clients to provide the court with a current address and phone number and to inform the court of any changes. No addresses or phone numbers were provided.

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1 Nomura confirmed that this was the most current address for all of his clients.

Before Nomura's withdrawal, on September 15, the court granted plaintiff's August 21 motion for entry of default judgment against NTDEC, Wang Su-Tang, and Chen Mei-Lin for failure to comply with the discovery orders. Plaintiff subsequently moved successfully for entry of default judgment against each of the remaining defendants. The court issued a notice of hearing for proving up damages against the defaulted defendants, scheduled for March 30, 1993. Defendants did not appear at the hearing to rebut testimony presented by plaintiff. On June 7, 1993 the district court entered a default judgment in the amount of $24,059,062, plus fees and costs. The court also granted plaintiff a worldwide permanent injunction against defendants infringing activities.

On June 17, 1993, defendants petitioned the district court to set aside the default judgment. Among other things, defendants alleged that they had been erroneously advised by counsel that a default judgment would be unenforceable against them in Taiwan. The district court denied the motion. Defendants appeal the entry of judgment, the amount of damages, and the district court's refusal to set the judgment aside.

DISCUSSION

I. ENTRY OF DEFAULT JUDGMENT

Defendants argue that the district court lacked jurisdiction to enter a default judgment against them because technical errors in certain of the papers prepared by plaintiff deprived defendants of formally correct service and thereby deprived the court of in personam jurisdiction over defendants.

Whether a default judgment is void for lack of personal jurisdiction is a question of law reviewed de novo. Electrical Specialty Co. v. Road & Ranch Supply, Inc., 967 F.2d 309, 311 (9th Cir. 1992).

The first alleged defect concerns the omission of the words "Certificate of Service" and a corresponding signature line from several papers that plaintiff filed with the court. We hold that this omission did not deprive defendants of proper service or deprive the court of jurisdiction.

The papers in question state that a copy of the foregoing document was mailed on a certain date to the appropriate addresses. Some papers are signed underneath this statement, and some are signed only by the attorney at the end of the document's text. Defendants argue that unsigned statements of mailing, which do not include signature lines, are not certificates of service under Fed. R. Civ. P. 5(d). We hold that the alleged deviations are immaterial. Any defects in the form of the certificates of service accompanying the documents filed with the court were remedied by the undisputed affidavit of legal secretary Barbara S. Stamm, which was filed in connection with Nintendo's opposition to defendants' motion to set aside the default judgments.[2]/ Ms.

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2 Rule 5(d) requires that certificates of service accompany certain papers filed with the court. The certificates of service are evidence, but only evidence, that proper service was made. See Fed. R. Civ. P. 5(d), Advisory Committee Notes, 1991 amendment (stating that certificates of service are required to be on file because they may be useful for many purposes, including proof of service if an issue arises concerning the effectiveness of the service"); see also Fed. R. Civ. P. 4(l) ("Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended."). Rule 4(l) refers to the manner of service of the complaint. Both Rule 4(l) and the

Stamm testified that each of plaintiff's several motions for entry of default judgment were served by her on defendants at the addresses set forth in the district court's September 14, 1992 and October 5, 1992 orders authorizing withdrawal of defendants' counsel. Therefore, defendants' Rule 5(d) argument is unavailing.

Defendants also contend that service of the notice of hearing on the default judgment, as well as several other papers, was ineffective because plaintiff addressed them to "Henry Wong" rather than to the "defendants, in care of Henry Wong." Wong's affidavit states that he did not forward any of the mailings to defendants; rather, he returned some to the sender and disposed of the rest. Defendants argue that, because the envelopes were not addressed "in care of," Wong had no way of knowing he was supposed to forward the documents to defendants.

Defendants' argument is without merit. When confronted with an unfamiliar mailing, a reasonable person would begin to read it and would see defendants' names in the caption. Absent any suggestion that the addressee, Henry Wong, did not open or read his own mail, the omission of the "in care of" instruction could not deprive him of actual notice that the enclosures were intended for defendants. Omission of the "in care of" instruction was harmless. The issue is who, plaintiff or defendants, must bear responsibility for Wong's failure to forward the documents to defendants.

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note on Rule 5(d) reflect the drafters' intent that certificates of service be merely an aid to proof of valid service, and that the validity of service not be dependent on the formal correctness of the certificate filed with the court.

Responsibility rests squarely with the defendants. Their own attorney is the source of Wong's address; it was they who designated Wong as the agent to whom their mail should be entrusted. Thereafter, it was defendants' responsibility to advise Wong of his obligations as recipient of their mail. The alleged failures or omissions of Wong in disposing of their mail are no concern of plaintiff or the court.

Defendants argue that they were unable to advise Wong of his responsibilities, because there is no evidence that defendants ever received notice of the court's order that defendants mail should be sent to them in care of Wong. Wong's and NTDEC's addresses were the last known addresses for defendants, given by defense counsel in counsel's motions to withdraw and incorporated into the court's orders permitting withdrawal. Nonetheless, defendants contend that they cannot be charged with knowing that Wong would be receiving their papers, because counsel had been unsuccessful at contacting defendants even before that point. In short, defendants ask the court to relieve them of responsibility for all events occurring after they broke off contact with their attorneys. This court will not do so.

Defendants' success at evading the diligent efforts of their own attorneys to communicate with them is additional proof that none of plaintiff's alleged errors in service were of any practical consequence. Nevertheless, defendants make a final allegation of defective service: the certificates of service accompanying plaintiff's documents failed to declare that copies were mailed to the "last known address" of defendants.

Defendants do not challenge the fact that the addresses listed were, in fact, the last addresses known to plaintiff. The addresses were those given to the court by defendants' attorneys, and the court had ordered all papers to be served on defendants at those addresses. Plaintiff was entitled to rely on the court's orders. Reference to the "last known address" in the certificates themselves was unnecessary.

Defendants were given proper notice of the hearings on the motions for default judgment. Defendants' failure to show up at the hearings to argue on their own behalf cannot be attributed to any fault of plaintiff or the court, and defendants must bear the consequences. The entry of judgment by default was entirely proper.

II. COMPUTATION OF THE AMOUNT OF THE JUDGMENT

Defendants challenge the amount of plaintiff's award, contending that, as a matter of law, the district court should have taken defendants' costs into account when it determined defendants' profits from their infringing activity. The district court heard evidence presented by plaintiff on defendants' gross sales, but the court did not offset this number by any amount representing defendants' costs of production and distribution.

Section 1117 of Title 15, United States Code, authorizes treble damages based on defendants' profits. It allocates the burdens of proof on sales and costs as follows: "In assessing profits the plaintiff shall be required to prove defendant's sales

only; defendant must prove all elements of cost or deduction claimed." 15 U.S.C. §1117(a).

Defendants argue that adherence to the statutory allocation of the burden is inappropriate when defendants are not present to defend themselves: even without any evidence presented by defendants, they argue that the court could and should assume that defendant had some costs; therefore, award of the full amount of gross sales was improper.

Defendants do not explain how the district court could have ascertained how much to deduct, even if it intended to deduct some amount representing defendants' costs of production. In light of defendants' failure to appear, plaintiff was the court's only source of information. If plaintiff chose not to provide information from which the court could infer defendants' costs, the court was not required to order plaintiff to produce additional evidence and argue defendants' case. Section 1117(a) explicitly states that "the plaintiff shall be required to prove defendant's sales only." All offsets are the responsibility of the defendant, who may either prove offsetting amounts or rely solely to the court's discretion.[3/] The statute specifically contemplates that if the defendant fails to meet its burden, and if the court does not see fit to modify the award in the interests of justice, no deduction will be made.

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3 Such discretion is explicitly granted to the court by 15 U.S.C. §1117(c), which states:

If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case.

In support of their argument, defendants point to cases in which the defendants were unable to prove their costs with the requisite specificity, but deductions were nevertheless made in order to avoid windfalls to the plaintiffs. However, the downward modification in these cases rests on the court's discretion to modify its award in the interests of justice.[4]/

The case at hand, however, is not one in which defendants tried to prove deductions but were unable to do so. Nothing but defendants' own intransigence prevented them from presenting their own cost figures. Absent any evidence of the amount of defendants' costs, the court was not obligated to take costs into account in calculating profits, and this court will not compel the district court to exercise its statutory discretion in defendants' favor.

III. MOTION TO SET ASIDE DEFAULT JUDGMENT

With respect to defendants' motion to set aside a default judgment, this court reviews the district court's factual findings for clear error. If findings are undisputed or are not clearly erroneous, then the lower court's ultimate determination

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4 For instance, American Honda Motor Co., Inc. v. Two Wheel Corp., 918 F.2d 1060 (2d Cir. 1990), held that the district court did not abuse its discretion to deduct costs, despite the fact that the defendants had not proved them with certainty, because the best information about those costs was in the hands of the plaintiff, whose sales of inputs to the defendant constituted the largest component of the defendant's costs. Even in that case, however, there was no argument that the district court was required to accept speculative cost deductions; rather, the court's discretion to do so was squarely grounded in the language of Section 1117(c).

is reviewed for an abuse of discretion. Meadows v. Dominican Republic, 817 F.2d 517, 521 (9th Cir. 1987).

Although default judgments are generally disfavored, a district court has discretion to deny a motion to set aside a default judgment when the defendant's culpable conduct led to the default. Id. A defendant's conduct is culpable if he has received actual or constructive notice of the filing of the action and failed to answer. Id. We find the defendants' conduct similarly culpable in this case: after answering, defendants willfully absented themselves from the proceedings, cut off contact with their attorneys, and evaded actual receipt of all further papers. Defendants' mistaken belief that they could evade payment of the resulting judgment because it would be unenforceable in Taiwan does not spell out any ground for setting aside the default judgment pursuant to Rule 60(b). The district court did not abuse its discretion in refusing to do so.

CONCLUSION

The judgment of the district court is AFFIRMED.

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MAY 19 1993
CLERK US DISTRICT COURT
DISTRICT OF ARIZONA
BY_____ DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

NINTENDO OF AMERICA INC.,	)
	)
Plaintiff,	)CV 91-300 TUC-JFB (WDB)
	)
vs.	)
	)
NTDEC, NINTENDO ELECTRONIC CO.; JIMMY YAO, WANG WEN-FU WANG SU-TANG, CHEN MEI-LIN and MEGA SOFT INC.,	)FINDINGS OF FACT AND)CONCLUSIONS OF LAW)))
Defendants.	)

An evidentiary hearing regarding damages in the above-captioned matter was held on March 30, 1993, before Senior United States District Judge James F. Battin. Notice was given to the defaulted Defendants but they failed to appear to rebut the testimony presented by Plaintiff Nintendo of America, Inc. (hereinafter "Nintendo"). The Court, having heard the testimony of the witnesses[1] and having reviewed the exhibits admitted into evidence, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Nintendo is a Washington corporation with corporate headquarters in Redmond, Washington. Nintendo is a wholly-owned subsidiary of Nintendo Company, Ltd. ("NCL") of Kyoto, Japan, and owns the copyrights and trademarks in its products in the United

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[1]The Court heard the oral testimony of Ms. Lynn E. Hvalsoe, John Tintinger, James Perrone, Mike Woodworth, and Robert Chesney.

States as well as in many other countries, such as Canada, Mexico, and South America. Nintendo markets its products in countries under registered Nintendo trademarks.

2. Nintendo is a leader in the video game industry with a reputation both in the United States and abroad for developing and producing high quality video game products.

3. Nintendo owns numerous, valid United States copyright registrations and trademarks registrations, including but not limited to the following:

U.S. COPYRIGHT REGISTRATIONS

GAME TITLE	COPYRIGHT REGISTRATION NO.
Balloon Fight	PA 247-651
Baseball	PA 219-072
Clu Clu Land	PA 246-926
Donkey Kong	PA 115-040
Donken Kong 3	PA 191-724
Donkey Kong Jr.	PA 146-003
Donkey Kong Jr. Math	PA 289-101
Duck Hung	PA 254-151
Excitebike	PA 254-906
F-1 Race	PA 540-572
Golf	PA 246-462
Hogan's Alley	PA 260-315
Ice Climber	PA 254-907
Mach Rider	PA 284-966
Mario Bros.	PA 178-079
Pinball	PA 247-092
Popeye	PA 154-248
Slalom	PA 908-801
Soccer	PA 288-502
Super Mario Bros.	PA 273-028
Super Mario Bros. 2	PA 451-717 (FCS)
Super Mario Bros. 3	PA 454-718 (FCS) PA 454-812 (NES)
Tennis	PA 204-665
Urban Champion	PA 241-478
Volleyball	PA 339-801
Wrecking Crew	PA 287-352

U.S. TRADEMARK REGISTRATIONS

TRADEMARK	TRADENARK REGIST. NO.	GAME TITLE	TRADENARK REGIST. NO.
Balloon Fight	1,454,474	Nintendo	1,213,822
Donkey KOng	1,331,984	Nintendo Enter-Tainment System	1,440,706
Donkey Kong 3	1,328,723	Nintendo Offic. Seal of Quality and Design	1,570,911
Donkey Kong Jr.	1,328,713	Slalom	1,447,728
F-1 Race	1,667,216	Urban Champion	1,469,207
Hogan's Alley	1,376,107	Duck Hunt	1,377,451
Ice Climber	1,467,524	Excitebike	1,379,330
Mach Rider	1,486,969	Super Mario Brs	1,453,314
Mario Bros.	1,303,633	Wrecking Crew	1,398,680

4. The above-identified Nintendo copyright registrations

protect the audiovisual aspects of the aspects of the applicable Nintendo video games.

5. The above-identified Nintendo trademark registrations protect various trademarks used by Nintendo in conjunction with its video game products. Nintendo's video game products are sold under its trademarks, which are recognized by the trade and purchasing public as being associated with only the highest quality products.

6. The commercial life span of a video game is limited, and the development and promotion of such games is costly. For instance, a single game may take a team of several authors up to two years to designate and develop and can cost as much as $500,000.00 or more to develop.

7. Nintendo has widely advertised and promoted its video game products throughout the United States and internationally. The extensive advertising and promotional campaigns have resulted in widespread use and acknowledgement of Nintendo products to the extent that approximately 90% of the homes in the United States are familiar with Nintendo's products. As a result, Nintendo has established a tremendous amount of goodwill in its trademarks domestically as well as internationally.

8. The sale, advertising and distribution of counterfeit video game cartridges results in lost profits to Nintendo and causes damage to Nintendo's business reputation.

9. During the combined years of 1990 and 1991, Nintendo and its licensees lost at least $2 billion worth of wholesale sales in the United States due to counterfeiting activity, and an additional

$2 billion internationally. Approximately 30% of those losses were directly attributable to Nintendo.

10. In 1990, approximately 20-50 million counterfeit video games were sold in the Western Hemisphere. Of these, approximately 75% violate one or more of Nintendo's registered trademarks.

11. Nintendo has an enforcement program for combating such infringement including reliance on the U.S. Customs Service to seize imported infringing products prior to entry into this country.

12. Through random inspection of goods, the U.S. Customs Service is able to prevent approximately 2-5% of such counterfeit importations into the United States.

13. Defendants NTDEC and NINTENDO ELECTRONIC COMPANY (jointly "NTDEC") are Taiwanese corporations, or are one and the same Taiwanese corporation.

14. Defendants JIMMY YAO, WANG WEN-FU, WANG SU-TANG, and CHEN MEI-LIN are citizens of Taiwan.

15. MEGASOFT, INC. of Los Angeles, California, is or was intended to be a United States corporation owned and operated by the previously identified Defendants to this action.

16. Nintendo has neither licensed nor assigned any copyright or trademark right to any of the Defendants. None of the Defendants has ever had any authority to act for Nintendo, whether as a licensee, distributor, agent or in any other capacity.

17. Nintendo was alerted to Defendants' activities as a result of an on-going investigation of counterfeiting activities in

Taiwan and elsewhere. On October 8, 1990, during the course of an undercover investigation of Defendants' activities, Nintendo's investigators visited and observed the Defendants' offices in Taiwan. The investigators were given a tour of the facilities and observed activities consistent with the operation of counterfeit video game production.

18. In the course of the investigation, Defendants provided the investigators with sale brochures (which contained advertisements for counterfeit Nintendo video game cartridges) and sold the investigators counterfeit video game cartridges. These games, sold and advertised by Defendants, were direct copies of Nintendo's copyrighted video games bearing one or more of Nintendo's registered trademarks.

19. Defendants admitted to Nintendo's investigators orally and in writing that they knew their actions, with regard to the advertisement and sale of counterfeit Nintendo video game cartridges, were illegal in the United States.

20. Defendants also provided the undercover investigators with price lists, showing sale prices of counterfeit Nintendo video game cartridges ranging from $1.93 for a single game cartridge to $34.00 for an 82-in-1 video game cartridge.

21. At different times in the course of the investigation, Defendants communicated orally and/or in writing that their factory could produce 1.2 million video game cartridges per year.

22. Defendants were active in their sales of counterfeit Nintendo video game cartridges from at least January of 1990 to

June of 1991. On June 4, 1991, Defendants Jimmy Yao and Wang Wen-Fu (aka Wen Fu Wang) were arrested in Chicago for violating 18 U.S.C. §2320 (trafficking in counterfeit goods) on the basis of their importation and sale of counterfeit Nintendo video game cartridges in the United States. The U.S. Attorneys' office did not prosecute the charges against the individual Defendants in exchange for the Defendant Nintendo Electronic Company, Ltd.'s December 23, 1991, guilty plea to the same felony charge. As a result, Defendant Nintendo Electronic Company, Ltd. paid a $50,000.00 fine and restitution in the amount of $2,442.50.

23. Documents seized from Defendants Wang and Yao at the time of their arrest included documents which reflected wide-spread activity in the assembly and distribution of counterfeit Nintendo video game cartridges.

24. In addition to the information obtained in the investigation of the Defendants, evidence procured through U. S. Customs' and/or FBI's seizures in New York, Ohio, Arizona, Florida, Nevada, Texas, and Montana of counterfeit video game products revealed that Defendants, acting wholly without authority, infringed Nintendo's valuable intellectual property rights in the advertisement, distribution and sales of counterfeit video games to customers in many other locations.

25. The evidence further showed:

a). Defendants sold at least 135 counterfeit Nintendo video game cartridges to a Taiwanese company known as Dar Yar which in turn sold those counterfeit cartridges to an undercover

purchaser in North Carolina.

b). Defendants provided catalogs advertising counterfeit Nintendo video game cartridges and provided counterfeit Nintendo video game cartridges themselves to a customer in Miami, Florida, known as Galaxia, which in turn sold at least $20,000.00 in cartridges to purchasers in Peru, at least $10,000.00 in cartridges to purchasers in Venezuela, and at least $2,000.00 in cartridges to purchasers in Costa Rica. Defendants also supplied counterfeit Nintendo cartridge components to Galaxia's factory in Venezuela which sold 150,000 counterfeit Nintendo cartridges per month, 20,000 cartridges per month of which were shipped to Mexico. Galaxia sold counterfeit Nintendo cartridges for approximately two years.

c). For an unknown period of time, Defendants sold 5,000-6,000 counterfeit Nintendo video game cartridges every three weeks to a company located in Mexico known as Mercadeo. Defendants conducted at least $2 million dollars worth of business with Mercadeo in the eighteen month period preceding August 8, 1990.

d). Defendants sold counterfeit Nintendo video game cartridges to Eviatar Parnass in Jacksonville, Florida during at least the year 1990. Products which were included in these sales were later discovered and seized in a civil action for trademark and copyright infringement brought by Nintendo against Mr. Parnass. The action resulted in a civil judgment against Mr. Parnass in the United States District Court, Middle District of Florida, Jacksonville Division, in the amount of $1,194,000.00 plus

attorneys fees and costs. This judgment was entered September 9, 1992 and has never been satisfied.

e). Defendants sold counterfeit Nintendo video cartridges to a company known as Rapidex in Miami, Florida, including a 250-in-1 Nintendo video game cartridge being sold by Rapidex for $330.00, and a 190-in-1 Nintendo video game cartridge which Rapidex sold for $150.00.

f). Defendants also supplied counterfeit Nintendo video game cartridges to another Taiwanese company known as Tri-Master, which in turn shipped such counterfeit cartridges to Las Vegas, Nevada. This shipment included counterfeit Nintendo video game cartridges incorporating up to 500 video games therein.

g). Defendants additionally sold great numbers of counterfeit Nintendo video game cartridges to a company in London, England, which in turn shipped these counterfeit Nintendo video game cartridges to New York, South Africa, and Los Angeles. One shipment included $6,000.00 worth of counterfeit Nintendo video game cartridges.

h). Defendants sold counterfeit Nintendo video game cartridges to a company known as AMC Enterprises, Inc., a California corporation. This corporation, and other individuals were the subject of a civil law suit brought by Nintendo for trademark and copyright infringement based on the sales of counterfeit Nintendo video games which resulted in a stipulated judgment in the amount of $110,000.00, which was paid by the Defendants in full.

26. In summary, Defendants knowingly and intentionally advertised, solicited sales and sold infringing Nintendo video game cartridges to its customers world wide, despite knowing a) that Nintendo was the copyright owner of many of the games contained in the counterfeit cartridges; b) that NTDEC was not authorized to do so by Nintendo; c) that the cartridges, or many of them, were counterfeit since they contained unauthorized direct copies of Nintendo's copyrights and trademarks; d) that their activities violated Nintendo's copyright and trademark rights; and, e) that their use of Nintendo trademarks would cause customer confusion. Further, Defendants' illegal domestic and extraterritorial activities had a direct impact on U. S. commerce by causing economic damage to Nintendo, a U. S. corporation.

27. In addition to the foregoing, the Court finds that Plaintiff's request for attorney fees and costs pursuant to 15 U.S.C. §1117 and 17 U.S.C. §505 is reasonable. Nintendo asserts that fees incurred by primary counsel in this case were $91,481.00 and that fees incurred by local counsel were $17,348.00. The Court having reviewed the Declaration of James Anable,[2] together with the summaries and actual time records of services rendered by counsel in this matter, finds that the hours expended on the litigation and the hourly rates charged are reasonable in light of the special skill and experience of counsel and the complexity of

2 Mr. Anable is a partner in the firm of Christenson, O'Connor, Johnson & Kindness, and he specializes in the field of intellectual property law, including patent, trademark, and copyright litigation.

the case.

Nintendo also filed a Bill of Costs for a total of $709.80 which includes $120.00 for the United States District Court filing fee and $589.80 for a reporter at Uen Fu Wang's deposition. The Court finds that these costs are reasonable.

28. Any of the foregoing Findings of Fact that are conclusions of law shall constitute conclusions of law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the causes of action herein pursuant to 17 U.S.C. §501; 15 U.S.C. §1121; and 28 U.S.C. §§1331, 1338.

2. The Defendants' activities as set forth in the foregoing Findings of Fact constitute copyright infringement pursuant to 17 U.S.C. §1101, et seq. The Defendants have wrongfully infringed at least 28 separate Nintendo U. S. copyright registrations, and some or all of the copyright registrations so infringed are set forth in Paragraph 3 of the foregoing Findings of Fact.

3. The Defendants' activities as set forth in the foregoing Findings of Fact constitute trademark infringement pursuant to 15 U.S.C. §1114(1). The Defendants have wrongfully infringed Nintendo's U. S. trademark registrations, and some or all of the trademark registrations so infringed are set forth in Paragraph 3 of the foregoing Findings of Fact.

4. The Defendants' activities as set forth in the foregoing Findings of Fact constitute false designation of origin pursuant to

15 U.S.C. §1125(a).

5. The Defendants' activities as set forth in the foregoing Findings of Fact constitute violations of Arizona statutes and also constitute common law unfair competition.

6. Pursuant to 15 U.S.C. §1116 and 17 U.S.C. §502, Nintendo is entitled to a worldwide permanent injunction to prevent the continued violation of its intellectual property rights.

7. The Defendants shall deliver to Nintendo any and all infringing goods for destruction pursuant to 15 U.S.C. §1118 and 17 U.S.C. §503.

8. Plaintiff is entitled to recover damages under 15 U.S.C. §1114 et seq., as well as damages under 17 U.S.C. §504, against all Defendants.

9. Plaintiff is entitled to recover attorneys' fees and costs and prejudgment interest under 15 U.S.C. §1117 and attorneys' fees and costs under 17 U.S.C. §505. Calculation of the amount of attorney's fees properly awarded begins with the calculation of a "lodestar" amount, which is "'the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.'" Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 106 S.Ct. 3088, 3097 (1986) (quoting Hensley, 461 U.S. at 433); Cunningham v. County of Los Angeles, 879 F.2d 481, 484 (9th Cir. 1988). This lodestar amount is presumptively reasonable. Jordan v. Multnomah County, 815 F.2d 1258, 1262-63 (9th Cir. 1987).

A District Court may adjust the lodestar figure based upon twelve factors listed in Kerr v. Screen Extras Guild, 526 F.2d

67, 69-70 (9th Cir. 1975).[3] however, certain of the Kerr factors have been held to be subsumed in the lodestar calculation, and do not provide a basis for a subsequent adjustment. Blum v. Stenson, 465 U.S. 886, 898-890 (1984); Cunningham, 879 F.2d at 484. Specifically, the subsumed factors are: the novelty and complexity of the issues; the special skill and experience of counsel, the quality of the representation, the results obtained and the superior performance of counsel. Id.

With these principals [sic] in mind, the Court concludes that Nintendo is entitled to an award of attorney fees in the amount of $108,829.00. Furthermore, the Court concludes that Nintendo's application for costs is also reasonable and awards Nintendo $709.80 as recoverable costs.

11. Plaintiff has elected to seek statutory damages under 17 U.S.C. §504(c) for the 28 registered copyrights infringed by Defendants. Plaintiff is entitled to recover the maximum statutory amount of $100,000.00 for each violation.

3 The twelve Kerr factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the client; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Kerr, 526 F.2d at 70.

12. For trademark damages, Plaintiff is entitled to recover Defendants' profits in the amount of $6,374,997.00 and is entitled to have that amount trebled pursuant to 15 U.S.C. §1117(b).

13. Prejudgment interest in the amount of 6.68% (annual interest rate established under Section 6621 of the Internal Revenue Code of 1954 as of 6/1/91) is applicable to said trebled amount under 15 U.S.C. §1117(b). The interest shall commence from the time the lawsuit was served, on June 5, 1991.

14. For trademark damages, Plaintiff is further entitled to recover its net losses in the amount of $433,296.00.

15. Defendants are entitled to a credit for the amount paid to Plaintiff in restitution in the amount of $2,442.50.

16. Any of the foregoing Conclusions of Law that are Findings of Fact shall constitute Findings of Fact.

Based on the foregoing Findings of Fact and Conclusions of Law,

IT IS ORDERED that Plaintiff have and recover of Defendants, jointly and severally, the sum of $24,059,062.00, with interest accruing from the date of this Order at the federal rate. Plaintiff shall have and recover of Defendants, jointly and severally, an award of attorneys' fees in the amount of $108,829.00 and costs in the amount of $709.80.

IT IS FURTHER ORDERED that Defendants and their respective agents, servants, employees, successors and assigns, and all of those acting in concert or participation with them, be permanently enjoined and restrained from, either in the United

States, or elsewhere in the world:

1. Using in any manner any of Nintendo's trademarks or any portion thereof, alone or in combination with any other mark which so resembles any of Nintendo's marks as to be likely to cause confusion, deception or mistake in connection with the manufacture, assembly, distribution, advertisement, promotion, offer for sale and/or sale of any product not manufactured, distributed, sponsored or sold by Nintendo;

2. Using in any manner any of Nintendo's works, characters or audio-visual materials which so resemble any of Nintendo's works as to be likely to be a copy thereof in connection with the manufacture, assembly, distribution, advertisement, promotion, offer for sale and/or sale of any product not manufactured, distributed, sponsored or sold by Nintendo;

3. Using any of Nintendo's copyrighted video games or characters or any colorable imitations thereof in the manufacture, assembly, distribution, advertisement, promotion, offer for sale and/or sale of any goods or merchandise;

4. Passing off, inducing or enabling others to sell or pass off any product or item as a product or item produced by Nintendo, which is not Nintendo's or not produced under the control or supervision of Nintendo and approved by Nintendo for sale under any of Nintendo's marks and as Nintendo's works;

5. Falsely representing themselves as being connected with Nintendo or sponsored by or associated with Nintendo or engaging in any act that is likely to cause the trade, retailers or members of

the purchasing public to believe that Defendants are associated with Nintendo or their activities are endorsed or approved by Nintendo;

6. Committing any acts calculated or likely to cause purchasers to believe falsely that goods sold by Defendants are sold under the control and supervision of Nintendo or are sponsored by, approved or connected with or guaranteed or produced under the control and supervision of Nintendo;

7. Using any logo, trade name or trademark which may be calculated to falsely represent or which has the effect of falsely representing that the services or products of third parties are sponsored by, authorized by, or in any way associated with Nintendo;

8. Otherwise infringing Nintendo's trademarks or copyrights in Nintendo's works or otherwise unfairly competing with Nintendo in any manner; and

9. Shipping, delivering, distributing, moving, destroying, returning or otherwise disposing of in any manner, excepting delivery to Nintendo's counsel, any products or components or inventory thereof not manufactured by or for Nintendo, nor authorized by Nintendo to be sold or offered for sale, which bear any of Nintendo's marks or embody any of Nintendo's works.

The Clerk is directed to enter judgment accordingly.

The Clerk is further directed to notify counsel for the respective parties of the making of this Order.

Done and dated this 17th day of May, 1993.

_____

Senior U.S. District Judge

/ FILED ___ LODGED
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ENTERED 6/9/93
JUNE 7, 1993
IN THE UNITED STATES DISTRICT COURT
CLERK US DISTRICT COURT
FOR THE DISTRICT OF ARIZONA DISTRICT OF ARIZONA
BY s/ DEPUTY

NINTENDO OF AMERICA INC.,	)
	)
Plaintiff,	)CV 91-300 TUC-JFB
	)
vs.	)
	)
NTDEC, NINTENDO ELECTRONIC CO., JIMMY YAO, WANG WEN-FU; WANG SU-TANG, CHEN MEI-LIN and MEGA SOFT INC.,	)AMENDED JUDGMENT) IN A CIVIL CASE)))
Defendants.	)

Decision by the Court amending JUDGMENT IN A CIVIL CASE entered by the Clerk of Court for the District of Arizona on May 19, 1993. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiff Nintendo of America Inc. ("Nintendo") have and recover of Defendants NTDEC, NINTENDO ELECTRONIC CO., JIMMY YAO, WANG WEN-FU, WANG SU-TANG, CHEN MEI-LIN and MEGA SOFT, INC., jointly and severally, the sum of $24,059,062.00, with interest accruing from the date of this Order at the federal rate. (3.25%)

IT IS FURTHER ORDERED that Plaintiff Nintendo shall have and recover of Defendants NTDEC, NINTENDO ELECTRONIC CO., JIMMY YAO, WANG WEN-FU, WANG SU-TANG, CHEN MEI-LIN and MEGA SOFT, INC., jointly and severally, an award of attorneys' fees in the amount of $108,829.00 and costs in the amount of $709.80.

IT IS FURTHER ORDERED that Defendants NTDEC, NINTENDO ELECTRONIC CO., JIMMY YAO, WANG WEN-FU, WANG SU-TANG, CHEN MEI-LIN and MEGA SOFT, INC., and their respective agents, servants, employees, successors and assigns, and all of those acting in concert or participation with them, be permanently enjoined and restrained from, either in the United States, or elsewhere in the world:

1. Using in any manner any of Nintendo's trademarks or any portion thereof, alone or in combination with any other mark which so resembles any of Nintendo's marks as to be likely to cause confusion, deception or mistake in connection with the manufacture, assembly, distribution, advertisement, promotion, offer for sale and/or sale of any product not manufactured, distributed, sponsored or sold by Nintendo;

2. Using in any manner any of Nintendo's works, characters or audio-visual materials which so resemble any of Nintendo's works as to be likely to be a copy thereof in connection with the manufacture, assembly, distribution, advertisement, promotion, offer for sale and/or sale of any product not manufactured, distributed, sponsored or sold by Nintendo;

3. Using any of Nintendo's copyrighted video games or characters or any colorable imitations thereof in the manufacture, assembly, distribution, advertisement, promotion, offer for sale and/or sale of any goods or merchandise;

4. Passing off, inducing or enabling others to sell or pass off any product or item as a product or item produced by Nintendo,

which is not Nintendo's or not produced under the control or supervision of Nintendo and approved by Nintendo for sale under any of Nintendo's marks and as Nintendo's works;

5. Falsely representing themselves as being connected with Nintendo or sponsored by or associated with Nintendo or engaging in any act that is likely to cause the trade, retailers or members of the purchasing public to believe that Defendants are associated with Nintendo or their activities are endorsed or approved by Nintendo;

6. Committing any acts calculated or likely to cause purchasers to believe falsely that goods sold by Defendants are sold under the control and supervision of Nintendo or are sponsored by, approved or connected with or guaranteed or produced under the control and supervision of Nintendo;

7. Using any logo, trade name or trademark which may be calculated to falsely represent or which has the effect of falsely representing that the services or products of third parties are sponsored by, authorized by, or in any way associated with Nintendo;

8. Otherwise infringing Nintendo's trademarks or copyrights in Nintendo's works or otherwise unfairly competing with Nintendo in any manner; and

9. Shipping, delivering, distributing, moving, destroying, returning or otherwise disposing of in any manner, excepting delivery to Nintendo's counsel, any products or components or inventory thereof not manufactured by or for Nintendo, nor

authorized by Nintendo to be sold or offered for sale, which bear any of Nintendo's marks or embody any of Nintendo's works.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 3rd day of June, 1993.

s/
JAMES F. BATTIN
Senior U. S. District Judge

/ FILED ___ LODGED
___ RECEIVED —COPY
AUG 25 1993
CLERK US DISTRICT COURT
DISTRICT OF ARIZONA
BY s/ DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OP ARIZONA

NINTENDO OF AMERICA INC.,	)
	)
Plaintiff,	)CV 91-300 TUC-JFB (WDB)
	)
vs.	)
	)
NTDEC, NINTENDO ELECTRONIC CO., JIMMY YAO, WANG WEN-FU WANG SU-TANG, CHEN MEI-LIN and MEGA SOFT INC.,	)MEMORANDUM AND ORDER
	)
Defendants.	)

Presently pending before the Court is Defendants' Motion to Set Aside the June 7, 1993, Amended Default Judgment. Neither party has requested a hearing on this matter, and the Court deems it unnecessary to conduct such a hearing. Having carefully considered the briefs and supporting materials submitted by the parties, the Court hereby denies Defendants' motion for the reasons set forth below.

BACKGROUND

On May 31, 1991, Plaintiff filed a Complaint for copyright infringement, trademark infringement, and unfair competition against Defendants NTDEC, Nintendo Electronic Co., Jimmy Yao, Wang Wen-Fu, Wang Su-Tang, Chen Mei-Lin, and Mega Soft Inc. Due to Defendants' failure to respond to discovery requests, motions to compel, motions for default, and Court Orders, the Court entered default judgment and assessed damages against Defendants.

Ex. DD, II, Order dated September 15, 1992, Memorandum and Order dated May 17, 1993, and Judgment entered June 7, 1993.

Pursuant to Rules 55(c)[1,2] 59,[3] and 60[4], Fed.R.Civ.P., Defendants now request that this Court set aside the default judgment entered on June 7, 1993. Defendants allege that there were errors in the service of notices regarding default; that they

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1 Although Defendants cite Rule 55(d) on the first page of their Notice of Motion to set aside June 7, 1993, Amended Default Judgment, they quote and refer to Rule 55(c) in the text of their memorandum supporting the motion. Therefore, the Court will assume that they are referring to Rule 55(c) rather than 55(d).

2 Rule 55(c), Fed.R.Civ.P., provides:
For good cause shown the court may set aside entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

3 Rule 59, Fed.R.Civ.P, provides:
A new trial may be granted to all or any of the parties and on all or part of the issues . . ., (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in and [sic] action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct entry of a new judgment.

4 Rule 60(b), Fed.R.Civ.P., provides in relevant part:
On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment. . . .

relied in good faith on "incorrect" advice of counsel; that the Court has no authority to issue a world-wide injunction; and that the damages awarded are not supported by the evidence and are extreme.

Plaintiff, on the other hand, contends that Defendants "sat on their hands" throughout the proceedings, and simply failed to act, on the assumption that they could disregard civil enforcement of U.S. intellectual property laws. Plaintiff seriously questions Defendants' alleged innocence and ignorance of U.S. legal proceedings in light of the fact that Defendants have been represented by counsel at various stages in the proceedings in this case. In Plaintiff's view,the Court acted within its jurisdiction and entered judgment within its sound discretion.

DISCUSSION

It is undisputed that where a party refuses to obey discovery orders, a Court may enter an order "rendering a judgment by default against the disobedient party;..." Rule 37(b) (2), Fed.R.Civ.P.; Adriana Int'l. Corp. v. Thoeren, 913 F.2d 1406, 1410 (9th Cir. 1990) (court did not abuse its discretion in imposing the sanction of default judgment due to plaintiff's numerous discovery abuses). A Court may relieve a party from a final default judgment pursuant to Rule 60(b), Fed.R.Civ.P., which provides for relief from a judgment in certain circumstances such as mistake, inadvertence, surprise, excusable neglect, and any other reason justifying relief from the judgment entered. A district court may, however, deny a Rule 60(b) motion "if (1) the defendant's culpable

conduct led to the default, (2) the defendant has no meritorious defense, or (3) the plaintiff would be prejudiced if the judgment is set aside." Meadows v. Dominican Republic, 817 F.2d 517, 521 (9th Cir., 1987); see Direct Mail Specialists, Inc. v. Eclat Computerized Techonologies, 840 F.2d 685, 690 (9th Cir. 1988); Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984). "If a default judgment is entered as the result of a defendant's culpable conduct, . . . [a court] need not consider whether a meritorious defense was shown, or whether plaintiff would suffer prejudice if the judgment were set aside." Meadows, 817 F.2d at 521. Finally, a court may provide relief from judgment by granting a new trial pursuant to Rule 59, Fed.R.Civ.P. With these principles in mind, the Court will address Defendants' contentions.

At the outset, the Court notes that the record certainly demonstrates that Defendants are not as "innocent" or "ignorant" as they now converiently assert. In fact, they were represented by counsel at various stages in the proceedings[5] and some of the Defendants even participated, to a limited extent, in discovery[6].

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5 A Phoenix attorney named Mr. Edmund Y. Nomura appeared before the Court on June 18, 1991, and accepted service on behalf of all Defendants in this action. Ex. C & Ex. D to Pl.'s Resp. Mr. Nomura thereafter filed an answer on July 2, 1991, on behalf of all Defendants. Ex. E to Pl.'s Resp. On August 14, 1991, Burton M. Bentley was substituted as attorney of record for Defendants Nintendo Electronic Co., Jimmy Yao, Wang Wen-Fu, and Mega Soft. Yet, Mr. Nomura continued to represent Defendants NTDEC, Chen Mei Lin and Wang Su-Tang. The Court allowed Mr. Bentley to withdraw on September 11, 1992, and allowed Mr. Nomura to withdraw on October 2, 1992. Ex. U & Ex. W to Pl.'s Resp.

6 For instance, Mega Soft Inc. replied to Plaintiff's first request for production of documents (Ex. I to Pl.'s Resp.); Nintendo Electronic Co. responded to Plaintiff's request for

It appears that Defendants simply chose to take the chance that any judgment would not be enforceable against them, and/or that without their participation in the discovery process, Plaintiff would not be able to prove its claims against Defendants. Having made this choice, Defendants must now live with the consequences.

I. ALLEGEDLY "DEFECTIVE SERVICE"

Defendants contend that service of the default papers upon Defendants in this case was defective for several reasons: (1) Plaintiff did not mail the motions for default to Defendants "in care of" Mr. Wong; and (2) Plaintiff's purported proofs of service did not explicitly state that the address used was the "last known address" of Defendants. The Court disagrees with Defendants' contentions for the reasons stated below.

First, the issue relating to the language "in care of Mr. Wong" arises out of an Order issued by the Court on September 11, 1992. In that Order, the Court allowed Mr. Burton Bentley, counsel for Defendants Nintendo Electronics Co., Jimmy Yao, Wang Wen-Fu, and Mega Soft Inc., to withdraw. The Court expressly provided in the Order that all further pleadings, motions and documents were to be served on these Defendants in care of Mr. Wong (Defendants' designated agent) at 6636 East 26th street, Los Angeles, California. See Ex. U to Pl.'s Resp. The Court further provided:

[s]hould Henry Wang [sic] change his address or telephone number or otherwise become unavailable for service without Defendants first advising and seeking the written authorization of this Court, and giving written notice to

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production of documents (Id.); and Plaintiff took Defendant Wang Wen-Fu's deposition in Tucson, Arizona (Ex. J).

Plaintiff, Defendant shall be subject to sanctions by the Court, including but not limited to entry of default judgment against any or all of Defendants.

Pursuant to this Order, Plaintiff mailed its motions for default against Nintendo Electronic Co., Jimmy Yao, Wang Wen-Fu, and Mega Soft to Mr. Wong at 6636 East 26th Street, Los Angeles, California. See Exs. Y, U, W, Z, EE, & GG to Pl.'s Resp.[7] Thus, each of these Defendants were served as the Court directed in its September 11, 1992, Order.

The Court finds Plaintiff's failure to use the specific words "in care of Mr. Wong" to be of no import. The Court simply intended that any papers in this action relating to these Defendants be mailed to Mr. Wong, as Defendants' designated agent. Clearly, it was Defendants' obligation to inform Mr. Wong of his duties, and to immediately inform the Court of any change in Mr. Wong's address or telephone number. Plaintiff was certainly entitled to rely on the Court's Order directing papers to be mailed to Mr. Wong and to also rely on Defendants to properly instruct Mr. Wong as to his duties regarding the papers in this action. If Defendants did not receive these papers, as they allege, due to

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7 On November 2, 1992, Plaintiff filed a motion for default against Nintendo Electronic Co. and Jimmy Yao and mailed a copy of the motion to Mr. Wong pursuant to the Court's Order. See Ex. Y & Ex. U. On January 15, 1993, Plaintiff filed its motion for entry of default against Wang Wen-Fu and mailed it to Mr. Wong as the Court directed. See Ex. EE & Ex. U to Pl.'s Resp. On February 1, 1993, Plaintiff filed a motion for default against Mega Soft, which was mailed to Mr. Wong, again pursuant to the address set forth in the Court's Order. See Ex. GG & Ex. U to Pl.'s Resp.

The Court also notes that Plaintiff filed its motion for default against NTDEC, Chen Mei-Lin and Wang Su-Tang on August 20, 1992. Ex. P to Pl.'s Resp. The motion was properly mailed to Mr. Nomura, Defendants' attorney of record on that date.

their failure to instruct Mr. Wong as to his obligations as their designated agent, Plaintiff is not to blame.

Furthermore, any attempt to argue that Mr. Wong was unfamiliar with Defendants and their difficulties in this matter is of no avail. After all, Mr. Bentley, Defendants' own attorney, expressly represented to the Court in his motion for withdrawal that Defendants consented to having all pleadings, motions, and other documents forwarded to Defendants care of Mr. Wong at 6636 East 26th Street, Los Angeles, California. See Ex. N. In addition, Mr. Wong was present with Jimmy Yao and Wang Wen-Fu at the 1991 Summer Consumer Electronics Show in Chicago (Ex. A to Pl.'s Suppl. Resp.); Mr. Wong was called by Jimmy Yao when he was arrested in June of 1991 (Ex. B to Pl.'s Suppl. Resp.); and Mr. Wong had a landlord/tenant relationship with Wang Wen-Fu and Jimmy Yao's company, Mega Soft.

Second, Defendants contend that Plaintiff's failure to expressly state in its certificates of service that the address used was the "last known address" of the Defendants constitutes defective service. The Court disagrees.

In the instant case, all Defendants were expressly instructed to immediately advise the Court of any changes in the addresses or phone numbers set forth in the Court's Orders.[8]

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8 As stated previously, in allowing Mr. Bentley to withdraw, the Court ordered all papers to be mailed to Mr. Wong and expressly ordered Defendants to advise the Court of any changes in Mr. Wong's address, telephone number, or availability. Ex. U to Pl.'s Resp.

In allowing Mr. Nomura to withdraw, the Court expressly provided that all pleadings, motions, and other Court documents

Therefore, absent some "update" by Defendants, Plaintiff was certainly entitled to assume that the addresses set forth in the Court's Orders were the "last known." Furthermore, Defendants allegation that Plaintiff somehow knew of more current addresses and simply did not use them is not only unfounded but also irrelevant, given the fact that it was Defendants' duty to advise the Court and Plaintiff of any address changes. See Affidavit of Sandra S. Froman and Howard R. Wine, Ex. D to Pl.'s Suppl. Resp.[9]

II. MR. BENTLEY'S "INCORRECT" ADVICE

Defendants Nintendo Electronic Co., Jimmy Yao, Wang Wen Fu, and Mega Soft, Inc. argue that they relied in good faith on Mr. Bentley's alleged advice that any judgment obtained in this case

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intended for NTDEC, Chen Mei-Lin, and Wang Su-Tang, be served on these Defendants at the address of NTDEC Electronics Co., 6F No. 22, Sec. 2, Keelung Road, Taipei, Taiwan, R.O.C. Ex. W to Pl.'s Resp. The Court also ordered Defendants to furnish the Court with their addresses and phone numbers and to immediately update the Court as to any changes. Id.

9 Defendants also assert that Wang Wen-Fu was never served or given notice of Plaintiff's Motion for Entry of Default because an envelope containing the motion was sent to NTDEC and returned. Defendants are apparently confused.

When Plaintiff filed its Motion for Entry of Default against Defendant Wang Wen-Fu, it mailed the motion to both Mr. Wong, Wen-Fu's designated agent, and NTDEC Electronics Co.. Defendants seem to argue that because the envelope mailed to NTDEC was returned, Wang Wen-Fu never received notice of the motion. This is incorrect. First, the motion related to Defendant Wang Wen-Fu, and the envelope sent to Mr. Wong (Wang Wen-Fu's designated agent) pursuant to a Court Order, was never returned. Ex. EE to Pl.'s Resp. The fact that the envelope containing the Motion for Entry of Default against Wang Wen-Fu was returned from NTDEC is irrelevant as far as effecting service on Wang Wen-Fu is concerned.

Second, Plaintiff's Motion for Entry of Default against Defendant NTDEC was filed on August 20, 1992, and was properly mailed Mr. Nomura, NTDEC's attorney of record at that time. Ex. P to Pl.'s Resp. Thus, Plaintiff properly served both motions.

would be unenforceable in Taiwan. They claim that their failure to answer the Complaint was due to their good faith reliance on this advice. Defendants apparently forget the fact that Mr. Nomura accepted service on behalf of all the Defendants on June 18, 1991, and thereafter filed an answer to the Complaint on behalf of all the Defendants.[10] Ex. E to Pl.'s Resp. Thus, Defendants did in fact file an answer to the Complaint in this action, before Mr. Bentley was even involved in the case.[11]

If Defendants are really arguing that their failure to respond to motions and Court Orders was due to Mr. Bentley's alleged advice, this also does not justify setting aside the default judgment in this case. Defendants were aware of the existence of this case and were obligated to inquire and respond accordingly to discovery requests, motions, and Court Orders. Defendants' recourse for any incorrect advice given by Mr. Bentley is against Mr. Bentley. Moreover, there is nothing in the record before the Court to substantiate Defendants' assertion that Mr. Bentley told them that any judgment obtained in this matter would be unenforceable in Taiwan.

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10 Defendants attempt to argue that Mr. Nomura was not authorized to represent the Defendants. Yet, Mr. Nomura appeared before the Court on June 18, 1991, and signed an acceptance of service and acknowledgement of authority to act on behalf of the Defendants. Ex. C & Ex. D to Pl.'s Resp. Defendants have submitted no credible evidence to support their assertion that Mr. Nomura was not authorized to represent Defendants.

11 Mr. Bentley became involved in this action on August 14, 1991, when he was substituted as counsel for Nintendo Electronic Co., Jimmy Yao, Wang Wen-Fu and Mega Soft. Ex. H to Pl.'s Resp.

III. DAMAGES

Defendants assert that the damages awarded in this case are speculative and unfounded. However, the Court arrived at the damage amount awarded only after reviewing many exhibits, hearing the testimony of witnesses, and carefully considering all the evidence presented by Plaintiff at the hearing conducted on March 30, 1993. Defendants did not appear at the hearing, despite the fact that Plaintiff mailed notices of the hearing to Defendants.[12] Thus, Defendants waived their opportunity to appear and rebut Plaintiff's testimony regarding damages. The Court will not now upset the judgment entered based on Defendants' mere blanket assertion that the damages awarded were "false, uncertain, speculative, vague, unproven, excessive and inflated."

CONCLUSION

Based on the foregoing, the Court finds it appropriate to deny Defendants' motion. As stated previously, default judgment was entered in this case due to Defendants' repeated failure to respond to motions and Court Orders. Defendants have had ample opportunities to present their arguments long before now and have

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12 On January 4, 1993, Plaintiff filed a Notice of Hearing for Proving up Damages on Default Judgment Pursuant to 55(b)(2), Fed.R.Civ.P., regarding Defendants NTDEC, Chen Mei-Lin, Wang Su-Tang, Nintendo Electronic Co., and Jimmy Yao. Ex. BB to Pl.'s Resp. This Notice was mailed, pursuant to Court Orders, to Mr. Wong and NTDEC.

On February 16, 1993, Plaintiff filed a Notice of Hearing for Proving up Damages on Default Judgment Pursuant to 55(b)(2), Fed.R.Civ.P., advising Defendants Mega Soft and Wang Wen-Fu that the hearing on damages was set for March 30, 1993. Ex. HH to Pl.'s Resp. Again, pursuant to Court Orders, Plaintiff mailed the notice to Henry Wong and NTDEC.

not afforded the Court with a credible excuse as to why they waited until this late date to finally come forward with their contentions. The Court will not expend more judicial resources addressing each and every complaint Defendants now have about what transpired in this action, since it resulted from Defendants' own failure to participate in the proceedings. Therefore, the default judgment of this Court, entered on June 7, 1993, will stand. Accordingly,

IT IS ORDERED that Defendants' Motion to Set Aside the Amended Judgment Entered on June 7, 1993, is hereby denied.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this Order.

Done and dated this th day of August, 1993.

s/
Senior U.S. District Judge

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(2)

No. 95-100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

NTDEC, NINTENDO ELECTRONIC CO., LTD., JIMMY YAO, WANG WEN-FU, WANG SU-TANG, CHEN MEI-LIN and MEGA SOFT, INC.,

Petitioners,

-against-

NINTENDO OF AMERICA, INC.,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners are engaged in a major worldwide counterfeiting operation which profits from the illegal pirating of Nintendo's copyrights and trademarks. They willfully ignored this litigation in the district court after receiving actual notice and service of process, and fled to Taiwan after removing all of their assets from the jurisdiction. A default judgment was entered on an extensive factual record and after repeated notices to petitioners. The judgment remains unsecured and unsatisfied.

Is there any ground upon which this Court should grant a writ of certiorari to petitioners to review their willful default when there was substantial support for the findings of fact and conclusions of law of the courts below, and the issues raised present no unresolved federal question requiring review by this Court and no point of law upon which lower courts are in conflict?

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Respondent, Nintendo of America Inc. ("Nintendo"),[1] submits this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit of Petitioners NTDEC, Nintendo Electronic Company, Ltd., Jimmy Yao, Wang Wen-Fu, Wang Su-Tang, Chen Mei-Lin, and Mega Soft, Inc. (collectively "petitioners").

STATEMENT OF THE CASE

Petitioners' statement of the case repeatedly misstates the record evidence on which the default judgments were entered against them below. The opinions of the district court and the Court of Appeals for the Ninth Circuit fairly recount that evidence. The following is a brief summary.

Petitioners are in the business of illegally reproducing and repackaging Nintendo's copyrighted video games in Taiwan for sale in the United States and other countries. PA. 3.[2] On June 4, 1991, United States Customs agents arrested petitioners Jimmy Yao and Wang Wen-Fu in Chicago on criminal charges of trafficking in counterfeit Nintendo video game cartridges. *Id.* With the advice of petitioners' criminal attorney, NTDEC pled guilty to a felony violation of trafficking in counterfeit goods in exchange for the government's agreement to drop all other criminal charges. *Id.*

In May 1991, Nintendo commenced this civil action against petitioners alleging copyright infringement, trademark

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[1] Pursuant to Rule 29.1 of this Court's rules, respondent states that Nintendo of America, Inc. is a wholly–owned subsidiary of Nintendo Company, Ltd., a Japanese corporation whose shares are traded on the Osaka and Tokyo stock exchanges.

[2] As cited herein, references to the Supplemental Excerpts of Record submitted by Respondent to the Ninth Circuit are designated "Supp. Rec."; references to Petitioners' Appendix are designated "PA.;" references to the civil docket sheet are designated "CR.;" references to the Excerpts of Record submitted by Petitioners to the Ninth Circuit are designated by "App. Rec."

infringement and unfair competition. *Id.* At the same time, Nintendo filed a motion for a temporary restraining order to freeze the petitioners' United States assets. The motion was granted. CR. 23. The summons and complaint and the restraining order were personally served upon petitioners Jimmy Yao and Wang Wen-Fu on the day of their arrest in Chicago. PA. 3. Petitioners' civil attorney, Edmund Nomura, acknowledged service on behalf of all petitioners and filed an answer on behalf of all petitioners on July 2, 1991. *Id.* On August 14, 1991, Burton M. Bentley, Esq. was substituted in place of Nomura as attorney of record for petitioners Nintendo Electronic Co., Inc., Jimmy Yao, Wang Wen-Fu and Mega Soft Inc. *Id.* Nomura continued to represent petitioners NTDEC, Chen Mei-Lin and Wang Su-Tang. *Id.*

Throughout the proceedings in the district court, petitioners repeatedly frustrated Nintendo's efforts to obtain discovery. PA. 4. Only two of the petitioners responded to Nintendo's first document request, and their answers were evasive and inadequate. On the day that Wang Wen-Fu's deposition was scheduled, petitioners' counsel requested, as a condition to proceeding with the deposition, access to the proceeds in a bank account which was frozen pursuant to the temporary restraining order. Nintendo agreed. CR. 41. Having gained possession of these assets, Wang Wen-Fu then refused to provide any substantive answers to counsel's questions, despite the fact that the criminal action against him had been concluded with a plea.

Thereafter, petitioners refused to participate in any further discovery. PA. 4. Nintendo filed motions to compel discovery which the district court granted. *Id.* The district court explicitly cautioned that the entry of a default judgment could result from failure to comply with its discovery orders. The moving papers and the district court's orders were duly served on petitioners. *Id.*

Bentley abruptly moved to withdraw as counsel on June 22, 1992. *Id.* His motion included signed authorizations by each of his clients (except Jimmy Yao) to serve all pleadings, motions and other documents to them "addressed to Defendants, and each of them c/o Henry Wong." *Id.* Bentley's motion to withdraw was mailed to petitioners in care of Wong. PA. 4. The district court granted Bentley's motion to withdraw on September 11, 1992. *Id.* The order directed that all pleadings, motions and other court documents intended for Bentley's clients be "served on said Defendants, in care of Henry Wong" at the address furnished by petitioners and that service upon Wong in this manner shall constitute service upon petitioners. *Id.* The Court further ordered that petitioners obtain written authorization of the court prior to any change of address by Mr. Wong and warned that failure to do so could result in a default judgment against them. PA. 38-39.

On September 4, 1992, Nomura had also moved to withdraw as counsel on the basis that his clients failed to respond to any of his letters or otherwise provide any instructions. PA. 4. On October 2, 1992, the district court granted Nomura's motion to withdraw, ordering that service on Nomura's clients be made to NTDEC Electronics Co., Ltd., 6F No. 22, Sec. 2 Keelung Rd., Taipei, Taiwan, R.O.C. *Id.* Nomura furnished this address and warranted that it was the most current address for all of his clients. *Id.* The district court's order also instructed each of Nomura's clients to provide the court with a current address and phone number and to inform the court of any changes. *Id.* None was ever provided. *Id.*

Prior to Nomura's withdrawal, on September 15, 1992, the district court granted Nintendo's motion for entry of default judgment against NTDEC, Wang Su-Tang, and Chen Mei-Lin for failure to comply with the discovery orders. PA. 5. Plaintiff subsequently moved for entry of default judgment against each of the remaining defendants which the district court granted. *Id.*

The district court issued a notice of hearing for proving up damages against petitioners scheduled for March 30, 1993. *Id.* Petitioners did not appear at the hearing. *Id.* Following a full hearing which included the courtroom testimony of five witnesses, the presentation of 95 exhibits and extensive written testimony, the district court entered a default judgment and assessed damages on May 17, 1993, in the amount of $24,059,062 against all defendants on the basis of substantial findings of fact and conclusions of law. App. Rec. 37.

On June 17, 1993, petitioners reappeared through new counsel and filed a motion to set aside the default judgment arguing for the first time alleged deficiencies in service and excessiveness of damages. PA. 35-36. In addition, defendants alleged, as a purported excuse for their failure to participate in the proceedings, that they had been advised by counsel that a default judgment would be unenforceable against them in Taiwan. PA. 36. The district court denied the motion in an 11-page Memorandum and Order dated August 20, 1993. PA. 34-44. Petitioners filed an appeal with the Court of Appeals for the Ninth Circuit. PA. 1. The Court of Appeals affirmed. PA. 2. Petitioners now petition this Court for a Writ of Certiorari. No bond has ever been posted to secure the judgment, and the judgment remains unsatisfied.

SUMMARY OF ARGUMENT

Petitioners are notorious counterfeiters who made a conscious choice to ignore civil litigation in the courts of this country. A default judgment was entered in this case on an overwhelming factual record establishing the petitioners' willful flouting of the process of the federal courts. On this factual record, no issue of due process arises, no important federal issue is presented, and no inconsistency in the application of federal law is even alleged. There is no basis upon which a writ of certiorari should be granted.

REASONS TO DENY THE WRIT

Petitioners do not present, nor does there exist, any ground upon which a writ of certiorari should be granted in this case. They have no answer to the fact that they, with proper notice, purposefully chose to ignore the proceedings in the lower court. Indeed, petitioners concede that their disregard for the district court proceedings was simply the result of their confidence that their sizable Taiwanese assets could not be reached by any judgment entered by that court, whatever the judgment's size and however fairly it was determined.

Petitioners' appeal presents a unique set of facts applicable only to petitioners. There is no question that petitioners received actual notice of the litigation and were given every opportunity to participate therein. Petitioners concede that they received service of the summons and complaint and actually appeared to enter an answer. Further, in March, 1992, petitioners responded to document requests and, on April 21, 1992, made misrepresentations to the district court and respondent regarding their intention to cooperate in the discovery process. Their actual participation in the litigation did not end until all of petitioners' assets were released, at which point petitioners fled the country.

Apart from the failure to point to any issue worthy of review by this Court, the issues petitioners wish to reargue before this Court are wholly without merit on the factual record presented. Petitioners' arguments were fully considered and properly rejected by the district court and the Court of Appeals for the Ninth Circuit.

Following petitioners' flight from the jurisdiction, all necessary pleadings were properly served upon petitioners at their last known address in Taiwan or pursuant to their own instructions — *i.e.* by service upon their authorized agent, Mr. Henry Wong. The district court's factual findings that there was no defect in service is fully supported by the facts of this case and should not be revisited by this Court. In affirming the district

court's judgment, the Court of Appeals was correct that petitioners' "failure to show up at the hearings to argue on their own behalf cannot be attributed to any fault of [respondent] or the court." PA. 9. The routine entry of a default judgment on the record presented, albeit in a large amount, presents no "special or important" legal issue for this Court's review.

Petitioners' challenge to the district court's calculations of petitioners' profits under the Lanham Act is equally without merit and unworthy of this Court's review. Petitioners' reliance on the Lanham Act's use of the word "profits" as a basis for appeal disregards the plain language of the statute: "In assessing profits the plaintiff shall be required to prove defendant's sales only; *defendant must prove all elements of cost or deduction claimed.*" Lanham Act, 15 U.S.C. § 1117(a) (emphasis added). If there is any discrepancy between the amount of the default judgment and the amount of petitioners' profits, the burden was on defendant to prove that discrepancy in the district court.

In light of the criminal counterfeiting conviction based on the same facts out of which this civil suit grew, petitioners had ample notice that a large judgment in respondent's favor would likely be reached. However, they purposely avoided participation in the litigation, content in their belief that no district court judgment could be enforced against their assets in Taiwan. There is conclusive factual support for the district court's finding that it was petitioners' own decision not to have greater participation in the lower court proceedings. Petitioners' bad faith failure to appear and offer the required proof in the court below forecloses them from attempting to offer that proof now.

Clearly, this is a situation in which petitioners made a choice to ignore litigation of which they were amply aware and now, in hindsight, wish to undo that which they themselves have done. They wish to avail themselves of the privileges of the United States courts, now including this Court, without subjecting themselves to the authority of those courts. The judgment

below was duly entered against petitioners on a conclusive factual record. Petitioners have not presented any ground upon which this Court should issue a writ of certiorari.

CONCLUSION

For each of the reasons set forth herein, the Petition should be denied.

DATED: July 26, 1995

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1995

NTDEC, NINTENDO ELECTRONIC CO., LTD., JIMMY YAO, WANG WEN-FU, WANG SU-TANG, CHEN MEI-LIN and MEGA SOFT, INC.,

Petitioners,

v.

NINTENDO OF AMERICA, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

In their Petition For Writ of Certiorari, Petitioners challenged the $25 million+ default judgment on a number of grounds. First, the huge $25 million+ default was based upon improper alleged mail service which trampled over FRCP Rule 5(b) and *Bowers v. E.J. Rose Mfg.*, 149 F.2d 612 (9th Cir. 1945) and *U.S. v. Brandt*, 8 F.R.D. 163 (1948), and thwarted the district court's September 11, 1992 Order, requiring service on each Petitioner "in care of Henry Wong". The so-called mail service was not calculated to give, and did not give Petitioners notice, and conspicuously failed to comply

with the restrictive-and-most-exacting-compliance standard required under FRCP Rule 5(b) for mail service.[1]

The Petition also explained that both law and equity demanded that the exaggerated $25 million+ default judgment – against the Taiwanese Petitioners, who reside on the other side of the globe and who are unfamiliar with the language and judicial system operating in the United States – be set aside.

The Petition concluded by describing how the outrageous $25 million+ default judgment awarded against the absent Petitioners, without notice, was based upon a series of unsupported assumptions which resulted in a vastly exaggerated gross sales damages without any offset for the cost of producing the alleged infringing goods.[2] The vast, exaggerated figure was then trebled to arrive at a $25 million+ default judgment which had no basis in fact or law.

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[1] *Timmons v. United States*, 194 F.2d 357 (4th Cir. 1952)

[2] Applying zero costs to the assumed sales was squarely contradicted by the testimony at the prove-up hearing by Respondent's own expert, Mr. John Tintinger, a Technical Support specialist that:

> "it is very costly [to produce the infringing cartridges because they use] Mass ROM [and defendants also] need to produce the printed circuit boards and their housings and assemble all those together, so it's a fairly sophisticated process."

I. The Court Should Grant The Petition To Resolve The Question Whether The District Court Can Unilaterally Discard The Requirements Of FRCP 5(b) And Arbitrarily Apply A Penalty Of Excessive Damages Without Regard To The Petitioners' Due Process Rights.

The Petition was supported by citations to substantial case law authorities. In contrast, Respondent's Brief In Opposition to Petition For Writ of Certiorari fails to refute any of the authorities cited in the Petition. In fact, Respondent's Brief fails to cite or distinguish *any* authorities to even attempt to excuse Respondent's failure to comply with FRCP Rule 5(b) and the district court's September 11, 1992 Order. Instead, Respondent's Brief demands slavish adherence to the district court's ruling, based upon the unsupported claim that Petitioners deserve to be punished with a $25 million+ default judgment because they are allegedly "worldwide counterfeiters" and "willfully ignored" the district court action. By falsely labeling Petitioners as "counterfeiters", Respondents are apparently attempting to prejudice this Court against the Taiwanese Petitioners to get the court to overlook Respondent's violations of FRCP Rule 5(b), and the excessive default judgment.

Slavish adherence to the district court's ruling is contrary to law. This case must be judged on a non-deferential *de novo* standard of review of the district court's ruling. By the same token, because of the failure to serve Petitioners under Rule 5(b), Petitioners were never given the opportunity to respond to the action on any of the counterfeiting allegations. Thus, Respondent's one-sided factual claims should not be considered for

purposes of this Petition. Moreover, Respondent's counterfeiting claims, even if they were true, are irrelevant and legally insufficient to justify trampling on Petitioners' due process rights under FRCP Rule 5(b), and the cases which interpret it, e.g., *Bower v. E.J. Rose Mfg., supra,* and *U.S. v. Brandt, supra.* Without Respondent's strict compliance with FRCP Rule 5(b), the district court lacked jurisdiction to award the excessive $25 million+ default judgment, which amount was factually and legally excessive and constituted an unfair penalty to Petitioners and a windfall to Respondent.

CONCLUSION

For the foregoing reasons set forth in the Petition and herein, the Petition should be granted.

Respectfully submitted,

JAY I. LEE

Dated: September 13, 1995